IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2006 Session

IN RE: CONSERVATORSHIP OF WILLIAM JOSEPH BURNETTE

Appeal from the Chancery Court for Hamilton County
No. 02-G-125 Howell N. Peoples, Chancellor

No. E2005-01742-COA-R3-CV - FILED NOVEMBER 29, 2006

The trial court removed Gary C. Jenkins as the health care attorney in fact for William Joseph Burnette. Mr. Jenkins appeals, arguing that the trial court erred by retrospectively applying the 2004 statutory amendment to T.C.A. § 34-6-204(a)(2)(B), which amendment states that a court may revoke or amend a power of attorney for health care or replace a health care attorney in fact "[u]pon application and good cause." We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Gary C. Jenkins, appellant, *pro se*.

Alan L. Cates and Valerie H. Richardson, Chattanooga, Tennessee, for the appellees, Eloise Burnette Roberson and Alice K. Roberson.

Stephen S. Duggins, Chattanooga, Tennessee, for the appellee, Manorhouse Assisted Living.

Linda J. Norwood, Chattanooga, Tennessee, Guardian *Ad Litem* for William Joseph Burnette.

OPINION

I.

Mr. Burnette is an 88-year-old man afflicted with Alzheimer's disease. He is a lifelong resident of Chattanooga and has amassed assets valued at approximately $900,000. He has never been married and has no children. Mr. Burnette's surviving relatives are his sister and two nieces. Although his relatives reside in Asheville, North Carolina, they frequently visit him in Chattanooga and take him to Asheville for visits.

Mr. Jenkins, who is unemployed, moved next door to Mr. Burnette in 1988. For many years, Mr. Jenkins assisted Mr. Burnette in his daily activities. As time went on, Mr. Burnette's ability to care for himself declined, and Mr. Jenkins took an active role in caring for him. In 2000, Mr. Burnette executed a will, in which he left 20% of his residuary estate to Mr. Jenkins. Mr. Burnette's will also devised certain property and percentages of his residuary estate to his sister and two nieces. Ten days after he executed his will, Mr. Burnette executed a durable power of attorney for health care, naming Mr. Jenkins as his attorney in fact.

In June, 2001, Mr. Burnette executed a general power of attorney, designating Mr. Jenkins as his attorney in fact. Mr. Jenkins then made several notable transactions concerning Mr. Burnette and his property. On September 12, 2001, one day after the terrible events of the day before, Mr. Jenkins withdrew $5,000 from one of Mr. Burnette's bank accounts. Mr. Jenkins testified that he withdrew this money to protect Mr. Burnette in case of a terrorist emergency in their area. In December, 2001, Mr. Jenkins transferred several shares of stock owned by Mr. Burnette to Mr. Jenkins' name. The stock was valued at approximately $90,000. According to Mr. Jenkins, Mr. Burnette gave him the stock as a gift. Around the same time, Mr. Jenkins used approximately $8,000 of Mr. Burnette's money to purchase a used automobile for himself. Mr. Jenkins testified that Mr. Burnette authorized the purchase of the automobile because the vehicle would be used to drive Mr. Burnette around and to address his care and business. In March, 2002, Mr. Jenkins placed Mr. Burnette in Manorhouse Assisted Living ("Manorhouse"), a facility in Chattanooga.

In July, 2002, Mr. Burnette's sister, Eloise Burnette Roberson, and one of his nieces, Alice Roberson (collectively "the Robersons"), initiated the first court proceeding in this case by filing a petition to appoint a conservator and guardian for Mr. Burnette. Attorney Charles Hill Anderson was appointed Mr. Burnette's guardian *ad litem*. Mr. Anderson's subsequent report recommended the following actions: (1) that the Robersons be appointed conservators of Mr. Burnette; (2) that Mr. Jenkins be required to furnish a final accounting and deliver all property of Mr. Burnette in Mr. Jenkins' possession; and (3) that the matter be referred to the Master to hear proof regarding, *inter alia*, (a) whether Mr. Burnette was competent to execute his will and power of attorney documents, (b) whether Mr. Jenkins had exercised undue influence over Mr. Burnette, and (c) the nature and value of the property transferred from Mr. Burnette to Mr. Jenkins.

In October, 2002, the parties entered into an agreed order appointing Mr. Jenkins as Mr. Burnette's conservator. The same order revoked the general power of attorney conveyed to Mr. Jenkins in 2001, but left in place the power of attorney for Mr. Burnette's health care needs. Thus, at this point in time, Mr. Jenkins had the authority to act as Mr. Burnette's conservator and to serve as his health care attorney in fact.

In early 2003, Mr. Jenkins filed a property management plan, inventory, and a motion for a conservator fee of $25,000. In response to these filings, the Robersons filed a motion to have a special master review the property management plan and inventory filed by Mr. Jenkins. Chancellor W. Frank Brown, III, entered an order referring the matter to the Clerk & Master. The Master's

subsequent report recommended, *inter alia*, (1) that Mr. Jenkins be removed as conservator; (2) that Mr. Jenkins be required to return the stock he received from Mr. Burnette; and (3) that Mr. Jenkins be directed to return the money he used to purchase the automobile. Thereafter, the trial court entered an order removing Mr. Jenkins as conservator of Mr. Burnette and naming First Tennessee Bank as the successor conservator. The court's order specifically permitted Mr. Jenkins to continue "mak[ing] medical, housing and other personal decisions for Mr. Burnette, pursuant to the terms of the Durable Power of Attorney for Health Care." The order further required Mr. Jenkins to consult with First Tennessee Bank regarding any decision with financial consequences for Mr. Burnette.

In April, 2004, Mr. Burnette's sister wrote a letter to Chancellor Brown requesting that Mr. Burnette be moved to a facility closer to her residence in Asheville. Mr. Jenkins opposed the move. Chancellor Brown then conducted a hearing to determine whether the move would be in Mr. Burnette's best interest. The court rejected Ms. Roberson's request to move Mr. Burnette, finding that she had failed to prove by clear and convincing evidence that Mr. Jenkins was acting in bad faith when he decided that Mr. Burnette should continue to live at Manorhouse in Chattanooga.

On July 1, 2004, T.C.A. § 34-6-204(a)(2)(B) was amended to state that, "[u]pon application and good cause shown, . . . a court may revoke or amend a durable power of attorney for health care or replace the attorney in fact designated in such power." The specific powers of a court to revoke or amend a power of attorney for health care or to replace an attorney in fact upon a showing of "good cause" were not addressed in the Code prior to this amendment.

In early 2005, Mr. Jenkins filed an annual report stating that Mr. Burnette's physical health, emotional stability, and medical outlook all "continue[d] to be good." During this same general time frame, however, Manorhouse employees became concerned about Mr. Jenkins' treatment and care of Mr. Burnette. Under the authority of the power of attorney for health care, Mr. Jenkins frequently removed Mr. Burnette from Manorhouse for day trips and overnight visits. Manorhouse provided Mr. Jenkins with medication for Mr. Burnette based on how long Mr. Jenkins said Mr. Burnette would be away from the facility. Mr. Jenkins occasionally kept Mr. Burnette away longer than he had communicated to Manorhouse; thus, during that extra time away from the facility, Mr. Burnette did not receive his medication.

Several Manorhouse employees also began to notice physical and hygiene problems with Mr. Burnette when he returned to the facility following time spent with Mr. Jenkins. On at least one occasion in December, 2004, Mr. Burnette returned with several scratches on his hands and knees. He also returned with dried feces in his underwear on this date. On January 6, 2005, Mr. Burnette returned with wounds on his chin and elbow. On this same date, Mr. Burnette returned with dried blood on his shirt and what appeared to be a blood stain on the front of his underwear.

On January 10, 2005, Matthew L. Whitley, the Executive Director of Manorhouse, sent a fax to Chancellor Brown expressing the facility's concern for Mr. Burnette's health and safety. In his letter to the Chancellor, Mr. Whitley stated his belief that Mr. Burnette may have been the subject of physical and/or sexual abuse while in the custody of Mr. Jenkins. Mr. Whitley further stated that

Mr. Jenkins had failed to provide sufficient medications for Mr. Burnette. In response, Chancellor Brown set a hearing to consider whether Mr. Jenkins should be removed as Mr. Burnette's health care attorney in fact. Chancellor Brown also appointed a guardian *ad litem* to investigate the complaints against Mr. Jenkins. The chancellor then recused himself from further proceedings in the case.

The newly-appointed guardian *ad litem*, Linda J. Norwood, subsequently conducted an investigation and filed a report recommending that Mr. Jenkins be removed as Mr. Burnette's health care attorney in fact. Ms. Norwood visited and examined Mr. Jenkins' residence, where Mr. Jenkins often took Mr. Burnette for day trips and overnight stays. Mr. Jenkins rented his house, which was built in 1888, for $40 a month. Ms. Norwood stated that the house was "extremely run-down" and "hard to get to." The outside walkways were cluttered and broken. Rotting lumber was stacked against the house near the entrance. The bathrooms were not clean, and the entire house was filled with dust. The house contained one bed. On the side of the bed, Ms. Norwood observed a plastic container filled with several inches of urine. She found the floors of the house to be in poor condition, noting missing tiles and the rotting of the subfloor. Ms. Norwood reported an odor of cats and stale food in the kitchen. She observed dirty dishes in the sink, on the table, and on the kitchen counters. She stated that there was no place to sit or eat a meal in the kitchen. Ms. Norwood also noted that the gas fireplace, which was lit when she examined the house, lacked a protective screen.

On February 4, 2005, Mr. Jenkins contacted a trust officer with First Tennessee Bank, the successor conservator of Mr. Burnette, stating that he wished to move Mr. Burnette from Manorhouse to a less expensive facility. The trust officer expressed her reservations about moving Mr. Burnette and stated that she would think about it and get back to him.

On February 6, 2005, Mr. Jenkins presented Manorhouse with a written complaint, stating that, on February 5, 2005, he had witnessed a Manorhouse employee being too rough with Mr. Burnette. The complaint stated that, upon entering Mr. Burnette's room, Mr. Jenkins and his friend, Doris Moxley, found a Manorhouse employee standing over Mr. Burnette in the bathroom "yelling at him and trying to pull his clothes off." The complaint stated that the employee "was squeezing [Mr. Burnette's] collarbone with her hand, hurting him." The complaint further stated that Mr. Jenkins planned to immediately remove Mr. Burnette from Manorhouse. Manorhouse conducted an immediate investigation of Mr. Jenkins' allegations and found the allegations to be "baseless and false."

On March 4, 2005, Cynthia Means, a Resident Care Assistant at Manorhouse, entered Mr. Burnette's room to get him dressed for breakfast. Mr. Burnette was on the phone when Ms. Means entered the room. After Mr. Burnette left the room, Ms. Means went to hang up the phone and heard a male and a female voice speaking on the other end of the line. She testified to hearing the male voice say, "They want to make it where I won't be over him any more, where they want to be over him all the time, and that would be the death of him." Ms. Means stated that she became frightened and left the room. She testified that she saw Alicia Bennett, the Program Director at Manorhouse, in the hall and told her about the statement she heard on the phone.

Ms. Bennett testified that she entered Mr. Burnette's room, picked up the phone receiver, and heard Mr. Jenkins talking about how Mr. Burnette's family had mistreated him most of his life. Ms. Bennett testified that she knew it was Mr. Jenkins' voice on the other end of the line because he had a "very unique voice," and she was familiar with his voice. She testified to next hearing a female voice say, "Yes, I understand. Yes, there's been a lot of pain. There's been pain. A lot of pain." Ms. Bennett stated that Mr. Jenkins then replied, "Yes, there was a lot of pain." Ms. Bennett testified, paraphrasing, that the woman then stated, "Yes, and Satan has ravaged your body. Satan has ravaged your body, and it's time to go on to a better place. There is a better place with the Lord." Ms. Bennett stated that Mr. Jenkins and the unknown female continued to repeat and rephrase this sentence over and over. Ms. Bennett stated that the tone and conversation was alarming. In order to get someone else to verify what she was hearing, Ms. Bennett laid the phone down and went to retrieve her supervisor. When she returned four minutes later, the telephone call had been terminated. The telephone indicated that the call to Mr. Burnette's room that morning was received at 7:05 a.m. and ended at 8:40 a.m. Mr. Jenkins admitted that he and his friend, Ms. Moxley, were on the phone with Mr. Burnette on the morning in question; however, he denied that he or Ms. Moxley made the statements testified to by Ms. Means and Ms. Bennett. Mr. Jenkins also testified that he had previously installed a device to record all of Mr. Burnette's telephone calls. He stated that he installed the recording device because Mr. Burnette was receiving harassing calls at all hours of the day and night.

On March 4, 2005, the trial court entered an order that restrained Mr. Jenkins from visiting, contacting, or being in the vicinity of Mr. Burnette. On March 7, 2005, Ms. Norwood telephoned Manorhouse to request that an employee inspect Mr. Burnette's room as a safety precaution. Two Manorhouse employees, Ms. Bennett and Lisa Jarvis, searched Mr. Burnette's room. They found a pill bottle with a prescription label for Mr. Burnette indicating that the bottle contained 30 hydrocodone pills. Ms. Jarvis testified that there were two pills remaining in the bottle. She also stated that, to her knowledge, Manorhouse had not filled that particular prescription because the label indicated that it was filled by a pharmacy not used by Manorhouse. Ms. Bennett and Ms. Jarvis also found two disposable razors and approximately 75 unopened letters addressed to Mr. Burnette from his sister. Ms. Jarvis testified that the Alzheimer's unit at Manorhouse did not permit residents to have disposable razors.

The trial court held a hearing on March 9 and 10, 2005. Chancellor Howell N. Peoples, sitting by interchange, concluded that there was "good cause" for the removal of Mr. Jenkins as Mr. Burnette's health care attorney in fact. In his order, Chancellor Peoples noted the following relevant findings:

> [Mr.] Jenkins presented numerous witnesses to testify to the extreme emotional connection [Mr.] Jenkins has with Mr. Burnette. Mr. Jenkins provides daily attention to Mr. Burnette. The relationship is basically one-sided; Mr. Burnette enjoys the company and attention of Mr. Jenkins, but he enjoys the company and attention of others as well. Mr. Jenkins described it as a "labor of love." The testimony

> establishes that Mr. Jenkins is driven by his personal emotional attachment to Mr. Burnette to control more than healthcare decisions. He has exercised control over Mr. Burnette's daily activities and attempts to direct the way in which [Manorhouse] cares for him. He has limited or excluded Mr. Burnette's contact with his sister and nieces. While Mr. Jenkins would have the Court believe that Mr. Burnette was estranged from his blood kin, the Will of Mr. Burnette includes bequests to his sister and nieces. He appears to prefer that Mr. Burnette stay in his suite alone rather than have interaction and association with other residents at [Manorhouse]. He appears to be jealous of anyone else having a relationship or association with Mr. Burnette that Mr. Jenkins does not control. He frequently takes Mr. Burnette out of [Manorhouse] for overnight visits and for visits as long as a week. After one such visit, he returned Mr. Burnette to [Manorhouse] with dried feces in his underwear. Mr. Jenkins has on several occasions failed or refused to administer to Mr. Burnette prescription medications as directed, and he has thrown medications away. He takes Mr. Burnette to Mr. Jenkins' home for overnight or weekend visits and the evidence clearly establishes that Mr. Jenkins' home is not a safe place for an Alzheimer's patient. Mr. Burnette fell while in the care of Mr. Jenkins although the Court would not consider that fact alone sufficient to remove Mr. Jenkins. Nor did the Court find it significant that Mr. Burnette suffered an abrasion to his chin while in the care of Mr. Jenkins. While the Court makes no findings concerning observations of alleged inappropriate touching of Mr. Burnette by Mr. Jenkins, such actions would merely be further evidence that Mr. Jenkins' relationship with Mr. Burnette is unhealthy. The Court concludes that good cause exists to remove Mr. Jenkins as healthcare attorney-in-fact.

Chancellor Peoples also appointed a disinterested person to serve as conservator/health care attorney in fact for Mr. Burnette and found no evidence that Mr. Burnette had been abused or improperly cared for by Manorhouse employees. This appeal by Mr. Jenkins followed.

II.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us burdened with a presumption of correctness as to the trial court's factual determinations – a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). We give weight to the trial court's assessment of the evidence because it is in a better position to evaluate the credibility of the witnesses. ***Thompson v. Adcox***, 63 S.W.3d 783, 787 (Tenn. Ct. App. 2001). Our review of questions of law is *de novo* with no presumption of correctness attaching to

the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III.

Mr. Jenkins' principal issue on appeal is whether the trial court erred in revoking the power of attorney for health care by retrospectively applying the "good cause" standard of evidence provided by the 2004 amendment to T.C.A. § 34-6-204(a)(2)(B). Mr. Jenkins contends that, because the power of attorney at issue was executed in 2000, the court had to find clear and convincing evidence of bad faith on his part, rather than mere "good cause," before removing him as attorney in fact.

Prior to July 1, 2004, T.C.A. § 34-6-204(a)(1) provided that, unless a health care power of attorney document provided otherwise, or unless a court found "by clear and convincing evidence that the attorney in fact [was] acting on behalf of the principal in bad faith, the attorney in fact . . . ha[d] priority over any other person to act for the principal in all matters of health care decisions." Subsection (a)(2)(A) of § 34-6-204 then provided that, when a court appointed a conservator, a guardian of the estate, or other fiduciary for the principal, that fiduciary "shall not" have the power to revoke or amend the power of attorney for health care or replace the attorney in fact. Subsection (a)(2)(B) further provided that the fiduciary did not have the power to revoke or amend the power of attorney for health care, notwithstanding the fact that under the Uniform Durable Power of Attorney Act, codified at T.C.A. § 34-6-101 *et seq.* (2001), a fiduciary possessed this power to revoke and amend. *See* T.C.A. § 34-6-104(a).[1]

Chapter 771, section 2, of the Public Acts of 2004 amended T.C.A. § 34-6-204(a)(2) as follows:

> (A) Notwithstanding the provisions of the Uniform Durable Power of Attorney Act, compiled in part 1 of this chapter, if a court appoints a conservator, guardian of the estate or other fiduciary, such fiduciary shall not have the power to revoke or amend a durable power of attorney for healthcare nor replace the attorney in fact designated in such power of attorney.

[1] T.C.A. § 34-6-104(a) provides, in relevant part, as follows:

> If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate or other fiduciary charged with the management of all of the principal's property or all such property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if the principal were not disabled or incapacitated.

> (B) Upon application and good cause shown, when appointing such fiduciary, a court may revoke or amend a durable power of attorney for health care or replace the attorney in fact designated in such power.

Subsection (a)(1) of T.C.A. § 34-6-204 was not amended; thus, it still states that, unless the power of attorney document states otherwise, or unless a court finds clear and convincing evidence that the attorney in fact is acting in bad faith, the health care attorney in fact has priority over all other persons in making health care decisions. Subsection (a)(2)(A), as amended, also provides nothing new. As was the law before the amendment, this subsection states that a court-appointed fiduciary shall not have the power to revoke or amend the power of attorney for health care or replace the attorney in fact, notwithstanding the provisions of the Uniform Durable Power of Attorney Act. It is the amendment to subsection (a)(2)(B) that significantly alters the previous statute by adding the power of the court to revoke or amend the power of attorney for health care or replace the health care attorney in fact "[u]pon application and good cause."

In analyzing the issue raised Mr. Jenkins, *i.e.*, whether the trial court erred by retrospectively applying the 2004 amendment to this case, the first question that arises is whether the trial court, in fact, *retrospectively* applied the amendment at issue. The general rule for what constitutes a retrospective application of a statute is provided by the following:

> Legislation is considered retroactive if its application determines the legal significance of acts or events that occurred prior to the statute's effective date. A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Instead, a court must ask whether the new provision attaches new legal consequences to events completed before its enactment.

16B Am.Jur.2d *Constitutional Law* § 690 (1998).

As previously noted, the amendment to T.C.A. § 34-6-204(a)(2)(B) became effective on July 1, 2004. Manorhouse employees noted the problems with Mr. Burnette's medications and his physical condition upon returning from day trips and overnight visits with Mr. Jenkins in late 2004 and early 2005. Approximately six months after the effective date of the amendment, *i.e.*, in January, 2005, the Executive Director of Manorhouse contacted Chancellor Brown regarding his concerns about Mr. Burnette's health and safety when in the custody of Mr. Jenkins. These concerns led to the Chancellor appointing a guardian *ad litem* and setting a hearing to determine whether it was appropriate to remove Mr. Jenkins as Mr. Burnette's health care attorney in fact. The fact that the power of attorney for health care was executed in 2000 is irrelevant. The events triggering the trial court's proceedings to remove Mr. Jenkins as health care attorney in fact occurred after July 1, 2004; therefore, the trial court's application of the 2004 amendment to T.C.A. § 34-6-204(a)(2)(B) is proper, involving, as it does, post-act events.

Even if we assume for the sake of argument that the trial court retrospectively applied the 2004 amendment to this case, we find this amendment to be within the class of enactments that may be applied retrospectively to pending cases. Although statutes are presumed to operate prospectively, ***Kee v. Shelter Ins.***, 852 S.W.2d 226, 228 (Tenn. 1993), statutes that are remedial or procedural in nature may be retrospectively applied. ***Nutt v. Champion Int'l Corp***., 980 S.W.2d 365, 368 (Tenn. 1998); ***Saylors v. Riggsbee***, 544 S.W.2d 609, 610 (Tenn. 1976). As stated by the Tennessee Supreme Court,

> [a]n exception exists . . . for statutes which are remedial or procedural in nature. Such statutes apply retrospectively, not only to causes of action arising before such acts become law, but also to all suits pending when the legislation takes effect, unless the legislature indicates a contrary intention or immediate application would produce an unjust result.

Kee, 852 S.W.2d at 228 (citing ***Saylors***, 544 S.W.2d at 610).

The question therefore arises whether the statutory amendment at issue is remedial or procedural – as opposed to substantive – in nature. "A 'substantive law,' which ordinarily can be applied prospectively only, is one that creates an obligation such that it creates, confers, defines, or destroys rights, liabilities, causes of action, or legal duties." 16B Am.Jur.2d *Constitutional Law* § 690. A remedial statute has been defined as a statute that "provides the means by which a cause of action may be effectuated, wrongs addressed, and relief obtained." ***Doe v. Sundquist***, 2 S.W.3d 919, 923 (Tenn. 1999). In ***Saylors***, the Supreme Court adopted the following description of "procedure":

> "[T]he mode or proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding, the court is to administer – the machinery, as distinguished from its product; . . . including pleading, process, evidence, and practice . . . . Practice [is] the form . . . for the enforcement of rights or the redress of wrongs, as distinguished from the substantive law which gives the right or denounces the wrong. . . ."

544 S.W.2d at 610 (quoting ***Jones v. Garrett***, 192 Kan. 109, 386 P.2d 194 (1963)) (emphasis in the ***Saylors*** opinion omitted). The amendment to T.C.A. § 34-6-204(a)(2)(B) authorizes a court to revoke or amend a power of attorney for health care or replace an attorney in fact upon an application and upon a showing of "good cause." The statute deals with the "process, evidence, and practice" of the court in revoking/amending a document or replacing an attorney in fact; thus, the statute at issue is clearly procedural in nature. *See* ***id.***

Finding that the statute in question is procedural, however, does not automatically permit its retrospective application. A remedial or procedural enactment may not be applied retrospectively in the following circumstances: (1) where the legislature has manifested a contrary intention; (2)

where application of the new law would impair a vested right or a contractual obligation; or (3) where immediate application of the statute would produce an unjust result. ***Kee***, 852 S.W.2d at 228; ***Saylors***, 544 S.W.2d at 610. We will address each of these exceptions in turn.

Chapter 771, section 2, of the Public Acts of 2004 offers no indication that the General Assembly intended the amendment to T.C.A. § 34-6-204 (a)(2)(B) to apply prospectively only. In the absence of any expression of that intent, we cannot assume such intent. Thus, we cannot hold that the legislature manifested an intent to prohibit the retrospective application of the 2004 amendment to T.C.A. § 34-6-204(a)(2)(B).

Likewise, application of the amended statute would not infringe upon any vested rights or contractual obligations. Article I, Section 20 of the Tennessee Constitution prohibits the enactment of any "retrospective law, or law impairing the obligations of contracts." This provision, however, "proscribes only those laws that divest or impair vested substantive rights." ***In re S.M., Jr.***, No. 01-A-01-9506-JV-00233, 1996 WL 140410, at *4 (Tenn. Ct. App. M.S., filed March 29, 1996). In the instant case, the power of attorney for health care imposed a duty upon Mr. Jenkins to act in Mr. Burnette's best interest. It did not convey a right or contractual commitment that Mr. Jenkins would continue as health care attorney in fact for Mr. Burnette when "good cause" exists for his removal. Mr. Jenkins does not have a vested right or contract obligation disturbed by the application of the 2004 amendment.

The third exception prohibits the retrospective application of a remedial or procedural amendment when doing so would produce an unjust result. ***Saylors***, 544 S.W.2d at 610. The State has the "power to serve as protector of incapacitated persons and to take all actions reasonably necessary to promote the incapacitated person's best interest." ***In re Conservatorship of Groves***, 109 S.W.3d 317, 349 (Tenn. Ct. App. 2003). Thus, the best interest of Mr. Burnette, rather than the best interest of Mr. Jenkins, is the paramount concern. There is nothing unjust about the court removing Mr. Jenkins as Mr. Burnette's health care attorney in fact when "good cause" exists for such removal.

IV.

Having determined that the trial court did not err in applying the 2004 amendment to T.C.A. § 34-6-204(a)(2)(B) to the instant case, we now turn to the factual question of whether "application and good cause" existed to warrant the trial court's removal of Mr. Jenkins.

Mr. Jenkins argues that the trial court did not follow the amendment to T.C.A. § 34-6-204(a)(2)(B) in that "[t]here was no application made" to the trial court. Chancellor Brown set the hearing to determine whether Mr. Jenkins should be removed as Mr. Burnette's health care attorney in fact after receiving a fax from the Executive Director of Manorhouse regarding his concern for Mr. Burnette's health and safety. Mr. Jenkins asserts that the *ex parte* communication from the Executive Director of Manorhouse and the trial court's subsequent decision to set a hearing to

determine whether to remove Mr. Jenkins was not in line with the procedure required by the statutory term "application."

We find this argument by Mr. Jenkins to be without merit. First, Mr. Jenkins did not object at the proceeding below to the manner in which his removal was brought before the trial court. Assuming that the procedure utilized by the trial court was irregular in nature, Mr. Jenkins' failure to object to the trial court's procedure coupled with his full participation in the court's hearing constitute a waiver of that error, if any, as far as this appeal is concerned. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). In addition, we note that T.C.A. § 34-6-204(a)(2)(B) does not preclude a court from acting *sua sponte* or upon an *ex parte* application if that court deems that immediate action is in the best interest of the ward. *See* ***AmSouth Bank v. Cunningham***, No. M2004-02376-COA-R3-CV, 2006 WL 468718, at *5 (Tenn. Ct. App. M.S., filed February 27, 2006) ("The probate court has, and indeed must have, the inherent authority to act *sua sponte* or upon an *ex parte* application prior to holding an evidentiary hearing when in the court's discretion it deems it in the best interest of the ward for whom it is ultimately responsible."). After receiving the fax from Manorhouse, the Chancellor felt it necessary to set a hearing to determine whether it was in Mr. Burnette's best interest to remove Mr. Jenkins as his health care attorney in fact. This action by the trial court was completely within the court's inherent authority and responsibility to act in Mr. Burnette's best interest.

We now move to whether there was "good cause" shown to warrant the trial court's removal of Mr. Jenkins. Mr. Jenkins does not raise this factual issue in his initial brief to this Court; however, he does make reference to the issue in his reply brief. The trial court found (1) that Mr. Jenkins "exercised control over Mr. Burnette's daily activities and attempt[ed] to direct the way in which [Manorhouse] care[d] for him"; (2) that Mr. Jenkins "limited or excluded Mr. Burnette's contact with his sister and nieces"; (3) that Mr. Jenkins preferred that Mr. Burnette stay isolated in his room rather than interact with other Manorhouse residents; (4) that, on at least one occasion, Mr. Jenkins returned Mr. Burnette to Manorhouse with dried feces in his underwear; (5) that Mr. Jenkins "failed or refused to administer" Mr. Burnette's medications as prescribed; and (6) that Mr. Jenkins' residence was "not a safe place for an Alzheimer's patient" to stay for overnight visits and long weekends.

As this Court has previously stated,

> "Good cause" is a relative and highly abstract term that should be construed not only in light of the context in which it appears in the statute but also in light of the nature of the proceedings involved. It is frequently equated with "substantial reason."

Williams v. State, No. 01-A-01-9206-BC00212, 1993 WL 41162, at *5 (Tenn. Ct. App. M.S., filed February 19, 1993) (citations omitted). Our review of the record and testimony, which is tempered

by the principle that the trial court is in the best position to assess the credibility of the witnesses, *see* ***Thompson***, 63 S.W.3d at 787, leads us to conclude that the evidence does not preponderate against the factual findings of the trial court. Given these factual findings, we hold that the trial court had "good cause," *i.e.*, substantial reason, to remove Mr. Jenkins as Mr. Burnette's health care attorney in fact.

V.

Mr. Jenkins' reply brief appears to raise the following additional issues: (1) whether Manorhouse is a party of standing in this case; (2) whether Chancellor Brown should have disqualified himself earlier because of the fact that his mother resided at Manorhouse when he began presiding over this case; and (3) whether Ms. Norwood, Mr. Burnette's guardian *ad litem*, violated the Fourth Amendment of the United States Constitution by conducting an "illegal search" of his residence. These issues were not raised below; therefore, they were and are waived as far as this appeal is concerned. ***Civil Serv. Merit Bd. v. Burson***, 816 S.W.2d 725, 735 (Tenn. 1991).

VI.

Lastly, we address a motion filed with this Court by Mr. Jenkins. After Mr. Jenkins filed his notice of appeal, the individual appointed by Chancellor Peoples to serve as Mr. Burnette's successor conservator/health care attorney in fact filed a motion with the trial court, requesting that the court continue Ms. Norwood's appointment as guardian *ad litem* "for the purpose of her responding to said appeal in her capacity as Guardian ad Litem for the Ward." Mr. Jenkins filed an objection to this motion, stating that the trial court "ha[d] no jurisdiction to entertain such a motion" because the Court of Appeals now had jurisdiction. The trial court subsequently granted the motion to continue Ms. Norwood's appointment, stating that she should continue to respond and participate until the conclusion of the appellate process. Mr. Jenkins thereafter filed a motion with this Court, requesting that we "clarify the question of Jurisdiction . . . and [] review the action of the trial court in entertaining the motion to 'continue' the guardian ad litem" pending appeal. This Court subsequently put down an order stating that we would dispose of Mr. Jenkins' motion upon our determination of the merits of this case.

We find no merit in Mr. Jenkins' motion. T.C.A. § 34-1-107(g) (2005 Supp.), which pertains to guardian *ad litems*, provides that "*[u]nless the court orders otherwise*, the guardian ad litem has no continuing duty once an order has been entered disposing of the petition which caused the guardian ad litem's appointment." The trial court in this case had the authority to "order[] otherwise," *i.e.*, to order that Ms. Norwood continue to serve as Mr. Burnette's guardian *ad litem* during the appellate process. We find no error in this action by the trial court.

VII.

The judgment of the trial court is affirmed. This case is remanded for the enforcement of the trial court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Gary C. Jenkins.

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CHARLES D. SUSANO, JR., JUDGE